AB 2015/44

EUROPEES HOF VOOR DE RECHTEN VAN DE

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Art. 6, 8, 14 EVRM

Eerlijk proces. Hoogste nationale rechter dient te motiveren waarom hij geen prejudiciële vragen stelt aan het HvJEU, indien daartoe is verzocht. Weigering toelage vanwege nationaliteit disproportioneel.

Klager is met zijn vrouw en vier minderjarige kinderen woonachtig en werkzaam in Italië (in welk verband hij ook sociale verzekeringspremies afdraagt), maar had op het moment dat het geschil ontstond de Tunesische nationaliteit. In 2001 vraagt hij een familietoelage aan, die volgens de Italiaanse wetgeving wordt uitgekeerd indien het gezin uit minimaal drie minderjarige kinderen bestaat, het gezamenlijke inkomen beneden een bij de wet bepaalde grens blijft en de aanvrager de Italiaanse nationaliteit bezit. Bij zijn aanvraag meldt klager dat de laatste eis hem niet kan worden tegengeworpen op grond van de Euro-mediterrane associatieovereenkomst tussen de Europese Unie en Tunesië.

De beslissende instantie weigert echter de toelage, louter op de grond dat klager niet de Italiaanse nationaliteit bezit. Aan het nationaliteitsvereiste liggen volgens de Italiaanse overheid budgettaire redenen ten grondslag. Klager wendt zich tot in hoogste instantie tot de nationale rechter en vraagt hem uitdrukkelijk prejudiciële vragen over de uitleg van de associatieovereenkomst te stellen aan het Europese Hof van Justitie (HvJEU). De hoogste rechter gaat niet op dit verzoek in, maar merkt wel op dat naar zijn oordeel de overeenkomst niet van toepassing is op familietoelages. Klager richt zich tot het Hof met de klacht dat artikel 6 lid 1 EVRM is geschonden door het ontbreken van elke motivering ten aanzien van zijn verzoek om prejudiciële vragen en dat artikel 8 in verband met artikel 14 EVRM is geschonden door het weigeren van een toelage enkel op grond van zijn nationaliteit.

Met betrekking tot het beroep op artikel 6 lid 1 EVRM stelt het Hof voorop dat een nationale rechter tegen wiens beslissingen geen hogere nationale instantie meer open staat en na een verzoek van een partij weigert prejudiciële vragen te stellen aan het HvJEU, dient aan te geven om welke redenen hij van oordeel is dat de opgeworpen vraag met betrekking tot het EU-recht niet relevant is voor het hem voorliggende geschil, dat de opgeworpen vraag reeds door het HvJEU is beantwoord of dat in het voorliggende geschil het EU-recht op zo'n wijze is toegepast dat er geen gegronde twijfel kan bestaan dat die toe- is gevonden naar het uitdrukkelijke verzoek van klager om prejudiciële vragen te stellen en derhalve niet duidelijk is om welke redenen de hoogste rechter het verzoek heeft afgewezen, is die omstandigheid naar het oordeel van het Hof voldoende om een schending van artikel 6 lid 1 EVRM aan te nemen.

Met betrekking tot het beroep op schending van artikel 8 in combinatie met artikel 14 EVRM merkt het Hof op dat de staat weliswaar over een ruime 'margin of appreciation' beschikt op het terrein van het economisch en sociaal beleid, maar hij niettemin zeer zwaarwegende redenen moet hebben om een onderscheid louter op de grond van nationaliteit te kunnen rechtvaardigen. Budgettaire redenen kunnen volgens het Hof een legitiem doel zijn, maar kunnen op zichzelf niet een onderscheid naar nationaliteit rechtvaardigen. Het komt aan op een proportionaliteitstoets. De staat had geen andere zwaarwegende argumenten naar voren gebracht, zodat de budgettaire redenen niet voldoende waren voor een gerechtvaardigd onderscheid naar nationaliteit. Artikel 8 en 14 EVRM zijn volgens het Hof geschonden.

Dhahbi,
tegen
Italië.

The Law

I. Alleged violation of article 6 § 1 of the convention

17. The applicant alleged that the Court of Cassation had ignored his request for a question to be referred to the CJEU for a preliminary ruling concerning the interpretation of the Euro-Mediterranean Agreement.

He relied on Article 6 § 1 of the Convention, which, in its relevant parts, provides:

"In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...".

18. The Government contested the applicant's argument.

A. Admissibility

1. The Government's preliminary objection that the application was out of time

19. The Government submitted at the outset that the application was out of time, observing that it had not been lodged until 2 April 2009, whereas the judgment of the Court of Cassation

had been deposited with the registry on 29 September 2008 (see paragraph 13 above).

20. The applicant submitted in reply that his application had been lodged on 28 March 2009, the date on which he had sent a copy to the Court's Registry by fax and by post. He pointed out that the judgment of the Court of Cassation had not been served on him until 2 October 2008 (see paragraph 16 above). It was the latter date that should be taken as the starting point of the six-month period.

21. The Court notes that on 28 March 2009 the applicant sent a copy of the application form, duly completed, by fax to the Registry, which received it the same day. A further copy was sent by post and reached the Registry of the Court on 2 April 2009. The application should therefore be considered to have been lodged on 28 March 2009. Accordingly, even supposing that, as the Government argued, the starting point for the six-month period provided for in Article 35 § 1 of the Convention should be 29 September 2008, the six-month time-limit was in any event complied with.

22. It follows that the Government's objection that the application was out of time cannot be upheld.

2. The Government's objection of failure to exhaust domestic remedies

23. In their additional observations of 17 January 2014 the Government argued for the first time that the applicant had failed to exhaust domestic remedies. If the Court of Cassation had misapplied the 'acte clair' doctrine and failed in its duty to refer a question to the CJEU for a preliminary ruling, the applicant could have brought a civil action to establish non-contractual liability on the part of the State, as advocated by the CJEU in its judgments in *Kobler* (30 September 2003, Case C-224/01) and *Traghetti del Mediterraneo* (13 June 2006, Case C-173/03). Actions of this kind were routinely examined by the domestic courts.

24. The Court points out that according to Rule 55 of the Rules of Court any plea of inadmissibility must, in so far as its character and the circumstances permit, be raised by the respondent Contracting Party in its written or oral observations on the admissibility of the application (see *N.C. v. Italy* [GC], no. 24952/94, § 44, ECHR 2002-X). In the present case the Government did not raise any objection as to failure to exhaust domestic remedies in their observations of 9 October 2013 on admissibility and the merits (in which, on the contrary, they stated that the judgment of the Court of Cassation 'constitute[d] exhaustion of domestic remedies'). The fact that the applicant had not brought a civil action to establish non-contractual liability on the part of the State was first mentioned in their additional observations on the merits and on just satisfaction. The Government did not provide any explanation for this delay and the Court cannot discern any exceptional circumstances that might exempt them from their obligation to raise any plea of inadmissibility in good time.

25. It follows that the Government are estopped from raising the objection of non-exhaustion of domestic remedies.

3. Other grounds of inadmissibility

26. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other ground. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

27. The applicant stressed that, in so far as it had been called upon to rule as the court of last instance, the Court of Cassation had been required to request a preliminary ruling where there was doubt as to the interpretation of Community law. The applicant submitted that he had cited the case-law in which the CJEU had recognised the direct applicability of the principle of non-discrimination in the field of social security, contained in the agreement between the European Union and the Kingdom of Morocco (and in other agreements between the European Union and the Maghreb countries — *Kziber*, Case C-18/90, judgment of 31 January 1991). In the applicant's view, that line of case-law, initially developed in the context of the cooperation agreements, was 'fully transposable' to the relevant provisions of the association agreements. The CJEU had also added that its interpretation was compatible with the requirements of Article 14 of the Convention and Article 1 of Protocol No. 1. Furthermore, the interpretation of the concept of 'social security' by the CJEU was sufficiently broad to encompass social-assistance benefits. In these circumstances, the applicant argued, it had not been open to the Court of Cassation to ignore the request to refer the question for a preliminary ruling.

28. The applicant added that the Court of Cassation had given no reasons for refusing to seek a preliminary ruling and had misunderstood the 'personal' and 'material' aspects of the non-discrimination principle, which were two quite separate concepts. The allowance in question

had been placed in the 'social assistance' category solely on the basis of domestic law, without reference to the criteria established by the CJEU (namely the statutory nature and dual function of the benefit and its connection to one of the risks referred to in Article 4(1) of Regulation No 1408/71). Hence, the 'Community' dimension of that categorisation operation had been overlooked. In the applicant's submission, it was clear from the European legislation and the case-law of the CJEU that State-funded 'non-contributory' benefits could not be automatically excluded from the scope of the non-discrimination principle established by the Agreement (the applicant cited, by way of example, the cases of *Yousfi*, Case C-58/93, judgment of 20 April 1994, concerning the granting of a disability allowance; *Commission v. Greece*, Case C-185/96, judgment of 29 October 1998, concerning various categories of benefits for large families; and *Hughes*, Case C-78/91, judgment of 16 July 1992, on the subject of the 'family credit' in the United Kingdom). On the basis of his references to that case-law, the Court of Cassation should either, of its own accord, have included the allowance he was claiming within the scope of Regulation no. 1408/71, by analogy, or referred the question to the CJEU, which had not yet ruled on the nature of this particular allowance.

29. The applicant also noted that section 13 of Law no. 97 of 6 August 2013 (which entered into force on 4 September 2013) had provided for the allowance introduced by section 65 of Law no. 448 of 1998 to be extended to third-country nationals in possession of a long-term residence permit. In judgment no. 133 of 2013 the Constitutional Court had found that the requirement to have been resident for five years in the region concerned in order to qualify for a regional allowance of a similar nature was unreasonable and incompatible with the principle of equality before the law (the applicant also cited judgment no. 222 of 2013).

(a) The Government

30. The Government submitted that the Court of Cassation had expressly examined the scope of the Euro-Mediterranean Agreement and had found that the allowance for families with at least three minor children could not come within the scope of the concept of social security, even in the broad sense in which it was construed at Community level. The Court of Cassation had therefore considered the provision it had been asked to interpret to be clear; accordingly, it had fulfilled its obligations under Article 6 § 1 of the Convention.

2. The Court's assessment

31. The Court points out that in the case of *Vergauwen and Others v. Belgium* ((dec.), no. 4832/04, §§ 89-90, 10 April 2012) it set forth the following principles:

— Article 6 § 1 requires the domestic courts to give reasons, in the light of the applicable law, for any decision refusing to refer a question for a preliminary ruling;

— when the Court hears a complaint alleging a violation of Article 6 § 1 on this basis, its task consists in ensuring that the impugned refusal has been duly accompanied by such reasoning;

— whilst this verification has to be made thoroughly, it is not for the Court to examine any errors that might have been committed by the domestic courts in interpreting or applying the relevant law;

— in the specific context of the third paragraph of Article 234 of the Treaty establishing the European Community (current Article 267 of the Treaty on the Functioning of the European Union (TFEU)), this means that national courts against whose decisions there is no judicial remedy under national law, and which refuse to request a preliminary ruling from the CJEU on a question raised before them concerning the interpretation of European Union law, are required to give reasons for such refusal in the light of the exceptions provided for by the case-law of the CJEU. They must therefore indicate the reasons why they have found that the question is irrelevant, that the European Union law provision in question has already been interpreted by the CJEU, or that the correct application of EU law is so obvious as to leave no scope for any reasonable doubt.

32. In the present case the applicant requested the Court of Cassation to seek a preliminary ruling from the CJEU as to whether, under Article 65 of the Euro-Mediterranean Agreement, a Tunisian worker could be refused the family allowance provided for by section 65 of Law no. 448 of 1998 (see paragraphs 10 and 12 above). As no judicial appeal lies against its decisions under domestic law, the Court of Cassation was under a duty to give reasons for its refusal to request a preliminary ruling, in the light of the exceptions provided for by the case-law of the CJEU.

33. The Court has examined the Court of Cassation judgment of 15 April 2008 and found no reference to the applicant's request for a preliminary ruling to be sought or to the reasons why the court considered that the question raised did not warrant referral to the CJEU. It is therefore not clear from the reasoning of the impugned judgment whether that question was considered not to be relevant or to relate to a provision which was clear or had already been interpreted by the

CJEU, or whether it was simply ignored (see, conversely, *Vergauwen and Others*, cited above, § 91, where the Court found that the Belgian Constitutional Court had duly provided reasons for refusing to refer questions for a preliminary ruling). The Court observes in this connection that the reasoning of the Court of Cassation contains no reference to the case-law of the CJEU.

34. That finding is sufficient for the Court to conclude that there has been a violation of Article 6 § 1 of the Convention.

II. Alleged violation of article 14 of the convention taken in conjunction with article 8

35. The applicant considered that he had been the victim of discrimination based on his nationality when it came to claiming entitlement to the allowance provided for by section 65 of Law no. 448 of 1998.

He relied on Articles 8 and 14 of the Convention, which provide:

> *Article 8*
> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."
>
> *Article 14*
> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

A. Admissibility

1. The parties' submissions

(a) The applicant

36. The applicant referred to the Court's case-law (citing, in particular, the following judgments: *Gaygusuz v. Austria*, 16 September 1996, *Reports of Judgments and Decisions* 1996-IV; *Petrovic v. Austria*, 27 March 1998, *Reports* 1998-II; *Niedzwiecki v. Germany*, no. 58453/00, 25 October 2005; *Okpisz v. Germany*, no. 59140/00, 25 October 2005; *Weller v. Hungary*, no. 44399/05, 31 March 2009; *Fawsie v. Greece*, no. 40080/07, 28 October 2010; and *Saidoun v. Greece*, no. 40083/07, 28 October 2010). He submitted that the allowance in question gave practical effect to the right of large families on low incomes to a financial contribution towards maintaining family life. Its introduction had resulted from a deliberate act on the part of the State based on the realisation that large families faced higher costs, linked mainly to their children's upkeep and education.

The applicant disputed the Government's argument that the allowance in question fell into the category of social assistance. Basing his assertions on the changes made to the system of family allowances in Italy, he submitted that they were actually aimed at improving the specific benefits paid to workers. The Court had repeatedly ruled that similar 'welfare benefits' were a means by which States could 'demonstrate their respect for family life within the meaning of Article 8' and thus came within the ambit of that provision or of Article 1 of Protocol No. 1, without this being dependent on the prior payment of contributions by the recipient (the applicant referred, in particular, to *Stec and Others v. the United Kingdom* [GC] (dec.), nos. 65731/01 and 65900/01, §§ 49-56, ECHR 2005-X).

37. The applicant noted that the sole obstacle to granting him the allowance had been his nationality. This amounted to discrimination compared with Italian citizens in a comparable financial and family situation to his own.

(b) The Government

38. The Government took the view that the subject matter of the application did not come within the scope of Article 8 of the Convention, as the social-assistance benefit claimed by the applicant could not be characterised as 'primary' assistance.

2. The Court's assessment

(a) Applicability of Article 14 of the Convention taken in conjunction with Article 8

39. As the Court has consistently held, Article 14 complements the other substantive provisions of the Convention and its Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded thereby. Although the application of Article 14 does not presuppose a breach of those provisions — and to this extent it is autonomous — there can be no room for its application unless the facts at issue fall within the ambit of one or more of them (see, among many other authorities, *Van Raalte v. the Netherlands*, 21 February 1997, § 33, *Reports* 1997-I; *Petrovic*,

cited above, § 22; and *Zarb Adami v. Malta*, no. 17209/02, § 42, ECHR 2006-VIII).

40. The Court considers first of all that the authorities' refusal to grant the applicant the allowance in issue was not aimed at breaking up his family, nor did it have such an effect, since Article 8 does not impose any positive obligation on States to provide the financial assistance in question (see *Petrovic*, cited above, § 26; *Zeïbek v. Greece*, no. 46368/06, § 32, 9 July 2009; and *Fawsie*, cited above, § 27).

41. Nevertheless, the Court has previously held that, by granting benefits to large families, States are able to "demonstrate their respect for family life" within the meaning of Article 8 of the Convention and that such benefits therefore come within the ambit of Article 8 (see *Okpisz*, cited above, § 32; *Niedzwiecki*, cited above, § 31; *Fawsie*, cited above, § 28; and *Saidoun*, cited above, § 29; see also, *mutatis mutandis, Petrovic*, cited above, §§ 27-29, in the context of a parental leave allowance, and *Weller*, cited above, § 29, in the context of maternity benefit). The subject matter of the application thus falls within the ambit of Article 8 of the Convention. Accordingly, Article 14 is applicable.

(b) Other grounds of inadmissibility

42. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other ground. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

43. The applicant observed that the Government sought to justify the difference in treatment between himself and European Union nationals and/or refugees by reference to the categorisation of the allowance (which allegedly fell into the category of 'social assistance') and to the financial cost of extending the allowance to new categories of individuals. In his view, these factors did not provide sufficient justification from the standpoint of the Convention and the case-law of the Italian Constitutional Court.

The applicant conceded that in the case of *Ponomaryovi v. Bulgaria* (no. 5335/05, § 54, ECHR 2011), the Court had found that the preferential treatment of nationals of Member States of the European Union was based on an objective and reasonable justification because the Union formed a special legal order, which had, moreover, established its own citizenship. However, it was necessary to take account of the fact that non-Community nationals also made an active contribution to the country's resources, in particular through their additional contribution to social-insurance schemes and the fact that they were subject to income tax. The applicant added that the discrimination to which he had been subjected had been based on his nationality and not on his immigration status as conferred by law (he cited, conversely, *Bah v. the United Kingdom*, no. 56328/07, ECHR 2011). Moreover, it had to be borne in mind that Directive 2003/109/EC was aimed at ensuring the integration of third-country nationals who were long-term residents of a Member State.

(b) The Government

44. The Government submitted that the decision not to extend entitlement to the allowance in question had been made purely for budgetary reasons and not on discriminatory grounds.

2. The Court's assessment

(b) General principles

45. According to the Court's settled case-law, in order for an issue to arise under Article 14 there must be a difference in the treatment of persons in comparable situations. Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (see *X and Others v. Austria* [GC], no. 19010/07, § 98, ECHR 2013, and *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09, § 76, ECHR 2013). The notion of discrimination within the meaning of Article 14 also includes cases where a person or group is treated, without proper justification, less favourably than another, even though the more favourable treatment is not called for by the Convention (see *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, § 82, Series A no. 94).

46. The Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a difference in treatment (see *X and Others v. Austria*, cited above, § 98, and *Vallianatos and Others*, cited above, § 76). The scope of the margin of appreciation will vary according to the circumstances, the subject matter and its background, but the final decision as to the ob-

servance of the Convention's requirements rests with the Court. A wide margin is usually allowed to the State when it comes to general measures of economic or social strategy (see *Burden v. the United Kingdom* [GC], no. 13378/05, § 60, ECHR 2008; *Carson and Others v. the United Kingdom* [GC], no. 42184/05, § 61, ECHR 2010; *Şerife Yiğit v. Turkey* [GC], no. 3976/05, § 70, 2 November 2010; and *Stummer v. Austria* [GC], no. 37452/02, § 89, ECHR 2011). However, very weighty reasons would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of nationality as compatible with the Convention (see *Gaygusuz*, cited above, § 42; *Koua Poirrez v. France*, no. 40892/98, § 46, ECHR 2003-X; *Andrejeva v. Latvia* [GC], no. 55707/00, § 87, ECHR 2009; and *Ponomaryovi*, cited above, § 52).

47. Since the Convention is first and foremost a system for the protection of human rights, the Court must also have regard to the changing conditions within Contracting States and respond, for example, to any evolving convergence as to the standards to be achieved (see *Konstantin Markin v. Russia* [GC], no. 30078/06, § 126, ECHR 2012, and *Fabris v. France* [GC], no. 16574/08, § 56, ECHR 2013).

(b) Whether there was a difference in treatment between persons in similar situations

48. In the Court's view, it is beyond doubt that the applicant was treated differently compared with workers who were nationals of the European Union and who, like him, had large families. Unlike them, the applicant was not entitled to the family allowance provided for by section 65 of Law no. 448 of 1998. Moreover, this was not disputed by the Government.

49. The Court further observes that the refusal to grant the allowance was based exclusively on the nationality of the applicant, who at the time was not a national of a European Union Member State. It was not alleged that the applicant did not satisfy the other statutory conditions for entitlement to the benefit in question. Hence, it is clear that he was treated less favourably than others in a relevantly similar situation, on account of a personal characteristic (see, *mutatis mutandis, Ponomaryovi*, cited above, § 50).

(c) Whether there was an objective and reasonable justification

50. The Court notes that in several cases cited above which were similar to the present case (*Niedzwiecki*; *Okpisz*; *Weller*; *Fawsie*; and *Saidoun*), and which also concerned welfare benefits for the families of non-nationals, it found a violation of Article 14 taken in conjunction with Article 8 on the ground that the authorities had not provided any reasonable justification for the practice of excluding non-nationals lawfully settled in the countries concerned from entitlement to certain allowances on the sole basis of their nationality.

51. In particular, in the cases of *Fawsie* and *Saidoun*, cited above, which like the present case concerned allowances for large families, the Court's finding of a violation was based especially on the fact that the applicants and the members of their families had been granted political refugee status and that the criterion chosen by the Government (which had focused mainly on whether the persons concerned were Greek nationals or of Greek origin) in order to determine eligibility for the allowance did not appear to be relevant in the light of the legitimate aim pursued (namely to deal with the country's demographic situation).

52. The Court is of the view that similar considerations apply, *mutatis mutandis*, in the present case. It notes in that connection that at the relevant time the applicant had been in possession of a lawful residence and work permit in Italy and had been insured with the INPS (see paragraph 6 above). He paid contributions to that insurance agency in the same capacity and on the same basis as workers who were European Union nationals (see, *mutatis mutandis, Gaygusuz*, cited above, § 46). He was not an alien residing in the country for a short period or in breach of the immigration legislation. Hence, he did not belong to the category of persons who, as a rule, do not contribute to the funding of public services and in relation to whom a State may have legitimate reasons for curtailing the use of resource-hungry public services such as social insurance schemes, public benefits and health care (see, *mutatis mutandis, Ponomaryovi*, cited above, § 54).

53. As to the 'budgetary reasons' advanced by the Government (see paragraph 44 above), the Court recognises that protection of the State's budgetary interests constitutes a legitimate aim of the distinction at issue. Nevertheless, that aim cannot by itself justify the difference in treatment complained of. It remains to be determined whether there was a reasonable relationship of proportionality between the above-mentioned legitimate aim and the means employed in the present case. The Court points out in that connection that the national authorities' refusal to grant the family allowance to the applicant was based solely on the fact that he was not a national of a European Union Member State. It is not disputed that a citizen of such a State in the same position as the applicant would receive the allowance in question. Nationality was therefore the sole crite-

rion for the distinction complained of. However, the Court reiterates that very weighty reasons would have to be put forward before it could regard a difference in treatment based exclusively on the ground of nationality as compatible with the Convention (see paragraph 46 above). In these circumstances, and notwithstanding the wide margin of appreciation left to the national authorities in the field of social security, the arguments submitted by the Government are not sufficient to satisfy the Court that there was a reasonable relationship of proportionality in the instant case that would render the impugned distinction compatible with the requirements of Article 14 of the Convention (see, *mutatis mutandis, Andrejeva*, cited above, §§ 86-89).

(d) Conclusion

54. In view of the foregoing, the justification advanced by the Government does not appear reasonable and the difference in treatment that has been established is thus discriminatory for the purposes of Article 14 of the Convention. There has therefore been a violation of Article 14 taken in conjunction with Article 8 of the Convention

III. Application of article 41 of the convention

55. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

56. The applicant claimed € 9,416.05 (EUR) in respect of pecuniary damage. This amount corresponded to the unpaid allowances for the period 1999 to 2004 (€ 8,016.05), plus statutory interest (€ 1,400).

57. He also requested that an award be made for non-pecuniary damage, but did not specify the amount.

58. The Government did not submit any observations on this point.

59. The Court observes that it found a violation of Article 14 of the Convention taken in conjunction with Article 8 on the ground that the refusal to grant the applicant the family allowance provided for in section 65 of Law no. 448 of 1998 amounted to discrimination on the basis of nationality. Accordingly, the pecuniary damage sustained by the applicant corresponds to the amount of the unpaid allowances, totalling € 8,016.05, a figure not contested by the Government. As statutory interest must be added to this amount, the Court awards the applicant the amount claimed, that is to say, € 9,416.05.

60. The Court further considers that the applicant undoubtedly suffered non-pecuniary damage. In view of the information in its possession, it awards the applicant the sum of € 10,000 under this head.

B. Costs and expenses

61. The applicant did not submit a claim for reimbursement of the costs and expenses incurred before the Court or the domestic courts. Accordingly, the Court considers that there is no call to award him any sum on that account.

C. Default interest

62. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

For these reasons, the court, unanimously,

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
3. *Holds* that there has been a violation of Article 14 of the Convention taken in conjunction with Article 8;
4. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:

(i) € 9,416.05 (nine thousand four hundred and sixteen euros and five cents) in respect of pecuniary damage;

(ii) € 10,000 (ten thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Noot

1. Deze uitspraak bevestigt een lijn die het Hof inzette in zijn uitspraak van 20 september 2011 inzake *Ullens de Schooten en Rezabek t. België* (*AB* 2012/26, m.nt. T. Barkhuysen en M.L. van Emmerik). Het Hof stelt voorop dat artikel 6

EVRM geen recht op een prejudiciële verwijzing inhoudt. Bestaat een dergelijk systeem echter op nationaal (zoals wij dat in Nederland inmiddels in civiele zaken kennen) of EU-niveau, dan kan een weigering om te verwijzen onder zeer bijzondere omstandigheden de eerlijkheid van de procedure onder artikel 6 EVRM aantasten, zelfs wanneer het niet de hoogste rechter betreft. Daarvan is echter alleen sprake wanneer de weigeringsbeslissing arbitrair is en/of niet gemotiveerd in het licht van de in het nationale recht of het EU-recht voorziene weigeringsmogelijkheden (bij het EU-recht: de acte éclairé, de acte claire of de toegestane uitzondering in het kader van een voorlopige voorziening). Zolang de nationale rechter zich begeeft binnen de grenzen van het (EU-)recht, is er dus bij een weigering te verwijzen geen sprake van een schending van artikel 6 EVRM.

2. Bijzonder in de hier opgenomen uitspraak is dat het Hof voor het eerst een schending aanneemt van deze motiveringsplicht. Daarbij valt op dat het Hof zich in dat verband redelijk formeel opstelt: een meer materiële motivering zonder expliciete verwijzing naar het verzoek om het stellen van een prejudiciële vraag en naar relevante HvJ EU-jurisprudentie is niet toereikend. De hoogste Italiaanse rechter had namelijk wel overwogen dat naar zijn oordeel de desbetreffende associatieovereenkomst niet het recht bevatte waarop klager aanspraak maakte. Het Hof vindt dat echter onvoldoende en lijkt te vergen dat wordt verwezen naar dit verzoek en dat met zoveel worden door de nationale rechter wordt ingegaan op de uitzonderingen die in de Luxemburgse jurisprudentie zijn erkend waar het betreft de verplichting voor de hoogste nationale rechter prejudiciële vragen te stellen. Een dergelijke motivering moet verder 'thoroughly' zijn, maar het Hof erkent dat het niet aan hem is om eventuele fouten die de nationale rechter maakt bij de toepassing van de HvJ EU-uitzonderingen te corrigeren (vgl. r.o. 31).

3. Bij een ontoereikend gemotiveerde afwijzing van een verzoek om een prejudiciële verwijzing kan aldus succesvol worden geklaagd bij het Straatsburgse Hof. Het is echter te hopen dat onze nationale rechters de noodzaak daartoe weten te voorkomen en zorgvuldig omgaan met dit soort verzoeken. Een alternatief zou nog kunnen zijn een procedure uit onrechtmatige rechtspraak tegen de staat voor de nationale rechter, langs de lijnen van de *Köbler*-rechtspraak van het HvJ EU (30 september 2003, *AB* 2003/429, m.nt. R.J.G.M. Widdershoven). Juist het niet stellen van prejudiciële vragen is daarin één van de vereisten om aansprakelijkheid aan te kunnen nemen.

4. Ten slotte — maar daarop gaan wij verder niet in — is het voor de sociale zekerheidsexperts nuttig om kennis te nemen van de overwegingen over de vraag of de toeslag al dan niet geweigerd kon worden gelet op de vereisten van artikel 8 juncto 14 EVRM (r.o. 43 e.v.). Het Hof stelt ook een schending van deze verdragsbepalingen vast omdat de weigering van de uitkering in de kern gebaseerd is op de niet EU-lidstaat-nationaliteit van klager. Bij deze grond geldt dat zwaarwegende rechtvaardigingsgronden naar voren moeten kunnen worden gebracht. Daarin is Italië naar het oordeel van het Hof niet geslaagd, zodat ondanks de ruime 'margin of appreciation' een schending wordt aangenomen.

5. Deze uitspraak is ook gepubliceerd in *EHRC* 2014/152, m.nt. H.J. van Harten en M.P. Beijer.

T. Barkhuysen en M.L. van Emmerik

AB 2015/45

AFDELING BESTUURSRECHTSPRAAK VAN DE RAAD VAN STATE
25 september 2013, nr. 201301980/1/A2
(Mrs. C.H.M. van Altena, A. Hammerstein, G.M.H. Hoogvliet)
m.nt. T. Barkhuysen en M.L. van Emmerik

Art. 10 Vw; art. 8, 14 EVRM; art. 94 Gw

ECLI:NL:RVS:2013:1278

Bestuursorganen zijn onder bijzondere omstandigheden verplicht om te beoordelen of een wet in formele zin buiten toepassing moet worden gelaten wegens strijdigheid met verdragsrecht.

Zoals de Afdeling eerder heeft geoordeeld, onder andere in de eerdergenoemde uitspraken van 22 december 2010 en 13 februari 2013, vinden ingevolge artikel 94 van de Grondwet wettelijke voorschriften geen toepassing, indien deze toepassing niet verenigbaar is met een eenieder verbindende bepaling van verdragen en van besluiten van volkenrechtelijke organisaties. Het niet toekennen van voorschotten huurtoeslag kan onder zeer bijzondere omstandigheden in het concrete geval worden aangemerkt als strijdig met het non-discriminatiebeginsel van artikel 14 van het EVRM in samenhang met het in artikel 8 van dat verdrag besloten liggende recht op respect voor het privéleven dan wel het familie- en gezinsleven, in welk geval de desbetreffende bepaling buiten toepassing gelaten moet worden. Gelet op het ingrijpende effect dat de weigering van voorschotten huurtoeslag kan hebben, dient de Belastingdienst een gemotiveerd beroep op zeer bijzondere omstandigheden zelfstandig te beoordelen.